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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
|-----------------|-------------|----------------------|---------------------|------------------|

10/664,101

09/17/2003

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1794

NOTIFICATION DATE

DELIVERY MODE

07/09/2008

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

| | | | |
|------------------------------|--------------------------------------|--|--|
| Office Action Summary | Application No. 10/664,101 | Applicant(s) BARTKOWSKA ET AL. | |
| | Examiner Kelly Mahafkey | Art Unit 1794 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 April 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 and 20-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 20-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claims 1-5 and 20-22 are pending.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-5 and 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brake (US 6432466) in view of Jonas (US 4971824). The references and rejection are incorporated herein and as cited in the office action mailed January 9, 2008.

Response to Arguments

Applicant's arguments filed April 8, 2008 have been fully considered but they are not persuasive.

Applicant argues that the references of record do not teach of highly stable, acid, frozen aerated products that contain milk proteins and sweeteners in combination with specific dietary fibers, from fruit purees, and do not contain any added emulsifiers and stabilizers. Applicant is referred to Brake, Abstract, in which Brake teaches of frozen product that contains milk proteins and sweeteners in combination with dietary fiber from fruit purees, and do not contain any added emulsifiers. Applicant is referred to Jonas which teaches that it was well known to aerated frozen food products (Column 2 lines 47-56). Specifically regarding the "no added stabilizers" applicant is referred to the response to arguments below which specifically addresses this limitation.

Applicant argues that Brake requires the addition of stabilizers in the aerated product and one would not have been motivated to exclude the addition of the stabilizers. As stated in the office action, pages 3-4, the claim recites, "wherein the frozen composition contains no additional stabilizers or emulsifiers". Initially it is noted that the claim does not exclude the presence of stabilizers in the composition and as stated in the office action one would have been motivated not to include additional stabilizers if stabilizers were included in the other ingredients of the frozen confection. Furthermore, in Example 1, Brakes teaches that the frozen composition contains 20-

35% of a base mixture which contains stabilizers, Brake does not teach adding additional stabilizers to the frozen compositions. Furthermore, even if the stabilizers in the base composition are considered as added stabilizers, they are included in the frozen composition in amounts as low as about 0.04% (about 0.2% stabilizer in the base mixture * 20% base mixture in the frozen composition = about 0.04%). As the amount of stabilizer is almost 0%, one of ordinary skill in the art would expect a composition with about 0.04% of a stabilizer to be similar to one that contains 0% additional stabilizer absent clear and convincing arguments and/or evidence to the contrary. Applicant is reminded that where the claimed and prior art products are substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). At the present time, applicant's statements that the products taught by the references of record are not the same and do not have the same properties as the instantly claimed invention are not convincing as there is no evidence to support them.

Applicant argues that the references of record would not have the same melt down initiation time as the references of record teach of a similar composition and not an identical composition and as the references of record do not teach of producing the confection through an identical process. Applicant has chosen to use parameters that cannot be measured by the Office, for the purpose of prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability. Applicant is reminded that where the claimed and prior art products are substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and

the prior art are the same, the applicant has the burden of showing that they are not." In *re Spada*, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Applicant specifically argues that the manufacturing process contributes to the product properties, specifically applicant argues that the milk protein is not pasteurized at a pH above its isoelectirc point. Applicant's argument is not convincing as

- a. Claims 1-5, 20 and 21 are product claims and do not recite processing steps.
- b. Claim 22, which is a product by process claim recites, "wherein a process of made by a process in which the milk solid protein is pasteurized in a premix said premix comprising a fruit and/or vegetable puree in which the pH of said puree is adjusted to a value above the isoelectirc point of the protein." There is nothing in the claim that requires that the pH be adjust prior to pasteurization.
- c. Applicant states that the pH of the milk protein composition as taught by Jonas when pasteurized is 3.4. Applicant states that the isoelectric point of milk proteins is typically 4.3-5. It is unclear as to how applicant determined the pH of the composition as taught by Jonas was 3.4 as Jonas teaches, column 2 lines 46-56, that the pasteurized base composition has a pH of less than 4.5, such as and including a pH of 4.4, a pH above the typical isoelectric point of some milk proteins.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e. the manufacturing process of the aerated confection) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant argues that because the references teach of optional components that are required in the instantly claimed composition, that one of ordinary skill in the art at the time the invention was made would not have been able to combine the components and arrive at the claimed invention. Applicant's argument is not convincing as the references teach of the components of the composition, optional or not, and as the

references teach of the components within the instantly claimed range. Furthermore, it is noted that the references provide for a reasonable number of combinations that would not require undue experimentation of one of ordinary skill in the art at the time the invention was made to obtain the desired product and product characteristics, as instantly claimed.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1794

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Mahafkey/
Examiner
Art Unit 1794